1986

State of Utah v. Caleen Lowe Jones : Brief of Respondent

Utah Supreme Court

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 860250
CALEEN LOWE JONES,	:	Category No. 2
Defendant -Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF CHILD ABUSE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-109(2)(a) (SUPP. 1986), IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY, STATE OF UTAH, THE HONORABLE J. HARLAN BURNS, JUDGE, PRESIDING.

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II. Whether the evidence presented at trial was sufficient to establish the offense of second-degree felony child abuse.

CONSTITUTIONAL AND STATUTORY PROVISIONS

76-5-109. Child abuse.

(1) As used in this section:

(a) "Child" means a human being who is 17 years of age or less;

(b) "Physical injury" means impairment of the physical condition including, but not limited to, any contusion of the skin, laceration, failure to thrive, malnutrition, burn, fracture of any bone, subdural hematoma, injury to any internal organ, any injury causing bleeding, or any physical condition which imperils a child's health or welfare;

(c) "Serious physical injury" means any physical injury which creates a permanent disfigurement; protracted loss or impairment of a function of a body member, limb or organ, or substantial risk of death.

(2) Any person who inflicts upon a child serious physical injury or, having the care and custody of such child, causes or permits another to inflict serious physical injury upon a child is guilty of an offense as follows:

(a) If done intentionally or knowingly, the offense is a felony of the second degree;

(b) If done recklessly, the offense is a felony of the third degree;

(c) If done with criminal negligence, the offense is a class A misdemeanor.

(3) Any person who inflicts upon a child physical injury or, having the care and custody of such child, causes or permits another to inflict physical injury upon a child is guilty of an offense as follows:

(a) If done intentionally or knowingly, the offense is a class A misdemeanor;

(b) If done recklessly, the offense

is a class B misdemeanor;

(c) If done with criminal negligence, the offense is a class C misdemeanor.

(4) Criminal actions under this section may be prosecuted in the county or district where the offense is alleged to have been committed, where the existence of the offense is discovered, where the victim resides, or where the defendant resides.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 860250
-v-	:	
CALEEN LOWE JONES,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Defendant, Caleen Lowe Jones, was charged with child abuse, a second degree felony, in violation of Utah Code Ann. § 76-5-109(2)(a) (Supp. 1986).

Defendant was convicted of child abuse, in a jury trial held February 24, 1986, in the Fifth Judicial District Court, in and for Iron County, State of Utah, the Honorable J. Harlan Burns, presiding. Defendant was sentenced by Judge Burns on April 10, 1986, to a term of imprisonment not less than one year nor more than fifteen years in the Utah State Prison.

STATE OF THE FACTS

During the last part of April, 1985, defendant, Caleen Lowe Jones, and her natural son,[1] sixteen month old, Jacob Hart Jones, moved into a house trailer located in north Cedar Valley (R. Vol. 4, 56-57). Defendant moved into the trailer with her

[1] The trial court found that defendant was the mother and legal custodian of Jacob Hart Jones (R. Vol. 1, 179, 188).

boyfriend, James Chad Anderson, who, as a co-defendant, pleaded guilty to child abuse, a third-degree felony (R. Vol. 2, 169-171). After his plea was entered, his case was severed from the present action (R. Vol. 2, 173).

On May 19, 1985, while in the care of Mr. Anderson, Jacob was placed in contact with the hot door of a clothes dryer and as a result received second-degree burns on his buttocks and left leg down to his calf. The burns were in a grid-work pattern (R. Vol. 1, 97; Vol. 2, 170). Defendant Jones did not notice the burns until the next morning and waited until early afternoon to take her son to the Valley View Medical Center (R. Vol. 4, 116). When they arrived at the emergency room, Doctor Michael Stults examined the physical condition of the young child and found that in addition to the large burn, the baby had many bruises of various ages and sizes. The bruises were located on both the soft and bony areas of his body especially on the stomach, chest, neck, and the backs of his legs. The doctor stated that it was "highly unusual to see this many bruises on any child at one time anywhere" (R. Vol. 1, 100).

The treatment of second-degree burns is usually a very painful and traumatic experience especially for a young child.[2] However, Doctor Stults and other hospital personnel observed that Jacob "was remarkably withdrawn and quiet. He never cried. He only whimpered a little bit." Instead of crying for his mother

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[2] The nurses normally have to strap young children to a papoose board by using velcro straps in order to hold the children down for treatment (R. Vol. 3, 420).

or demonstrating any separation anxiety from her as other small children would, he just sat there (R. Vol. 1, 111, Vol. 3, 422). Before leaving the medical center, defendant was told to keep the child's diaper dry since urine on the burn would be painful to her son. However, on each return visit to the hospital the nurses found Jacob's diaper saturated with urine (R. Vol. 3, 428, 440). They also reported that when the child was treated on each subsequent visit, he was withdrawn, detached, and did not cry as the painful treatment was administered (R. Vol. 3, 428, 446).

Shortly after the severe burns were first treated, a police investigation was started. As part of that investigation, defendant agreed that she and her little boy, would stay away from Mr. Anderson. However, on May 29, 1985, Kerry Hedin of Family Life Services found that defendant, Jacob, and Mr. Anderson were once again living together at the trailerhouse contrary to their agreement (R. Vol. 3, 464).

On the evening of May 30, 1985 defendant and Mr. Anderson had an intense, physical argument caused by his feelings toward Jacob (R. Vol. 4, 90-94). At 11:30 p.m., Anderson put Jacob to bed and 30 minutes later the infant was in a state of cardiac arrest (R. Vol. 3, 520). Defendant claimed that Anderson put the victim in a cold shower attempting to revive him (R. Vol. 3, 398) yet when they arrived at the medical center, Jacob was completely dry (R. Vol. 2, 398). The doctors and nurses also noticed puncture marks on the bottom of the child's feet (R. Vol. 2, 235-36, 400). Defendant denied any knowledge of the cause of these wounds (R. Vol. 2, 400).

The medical personnel managed to reestablish Jacob's heartbeat and he was transported to Primary Children's Hospital in Salt Lake City, Utah where he died (R. Vol. 2, 403, 406). An autopsy was performed and the report stated that the victim died of natural causes (R. Vol. 2, 323). However, the medical personnel refuted this and claimed that the infant was abused (R. Vol. 2, 267, 340-41, 351-52). Dr. William Martin Palmer, an expert in the diagnosis of child abuse, was of the opinion that Jacob was maliciously abused (R. Vol. 2, 340-41). Dr. Palmer explained:

> The kind of thing I'm talking about is the kind of material that goes on in whoever it is that created the burn in this boy to want to hurt him badly enough that they, whomever, held him against the object that burned him long enough to inflict serious burns, which are painful, which certainly should have resulted in screams and cries, and so on; and yet either he (Jacob) didn't because he had had this happen to him enough so he knew what would happen if he did say anything, or he did in fact have something happen to him and it just isn't part of our information base.

(R. Vol. 2, 341). He testified that Jacob fit well within the battered-child syndrome (R. Vol. 2, 299, 300). Dr. Palmer also testified that it was his opinion the physical injuries Jacob received created a substantial risk of death for the infant (R. Vol. 2, 361). He formulated his opinion based on written reports compiled by medical personnel who treated Jacob. He also viewed photographs of the severe burns, bruises, and puncture wounds that were found on Jacob's body (R. Vol. 2, 317, 358). These injuries contributed to a critical swelling of the brain from which Jacob died (R. Vol. 2, 310, 352, 360).

On February 27, 1986, the jury found defendant guilty of child abuse, a second degree felony (R. 57),[3] and on April 10, 1986, Judge Burns sentenced her to a term of imprisonment not less than one year nor more than fifteen years in the Utah State Prison (R. 62). From this conviction and sentence defendant now appeals.

SUMMARY OF THE ARGUMENT

An expert may testify in the form of an opinion that a combination of "physical injuries" created a "substantial risk of death" under 76-5-109(1)(c).

Also, the evidence was sufficient to establish that defendant intentionally or knowingly inflicted or permitted another to inflict serious physical injury upon her son.

ARGUMENT

POINT I

THE STATE'S EXPERT WITNESS WAS PROPERLY ALLOWED TO RENDER HIS OPINION THAT UNDER ALL THE FACTS AND CIRCUMSTANCES THE PHYSICAL INJURIES TO THE CHILD VICTIM CREATED A SUBSTANTIAL RISK OR DEATH.

Defendant, in her brief, challenges the admissibility of the expert testimony of Dr. William Martin Palmer who testified that, in his opinion, multiple physical injuries created a substantial risk of death for the 16-month-old Jacob

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[3] Utah Code Ann. § 76-5-109(2)(a) (Supp. 1986). "Any person who inflicts upon a child serious physical injury or, having the care and custody of such child, causes or permits another to inflict serious physical injury upon a child is guilty of an offense as follows:

(a) If done intentionally or knowingly, the offense is a felony of the second degree;"

Hart Jones.[4] However, the central issue of this appeal is whether Utah Code Ann. § 76-5-109(1)(c) (Supp. 1986)[5] allows physical injuries to be taken in the aggregate to constitute a "serious physical injury." If it does, then Dr. Palmer's testimony was clearly proper. It was on this narrow issue and a claim of surprise that defendant objected to Dr. Palmer's testimony at trial. She did not challenge the doctor's qualifications to render the opinion given. (R. Vol. 2, 284, 309, 330, 359).

Defendant claims there can be no construction of the statutory definition of "serious physical injury" that would allow a combining of a series of individual "physical injuries" in order to create a "substantial risk of death" (Appellant's Brief at 8). However, the wording of 76-5-109 suggests that such construction was intended by the Legislature.

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[4] Utah Rule of Evidence 702 clearly states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Dr. William Martin Palmer was accepted as an expert by the trial court and was allowed to assist the jury by giving them his expert opinion which was based on his knowledge, experience, training, and education in the area of child abuse. (R. Vol. 2, 284).

[5] 76-5-109. Child Abuse.
(1) As used in this section:
(c) "Serious physical injury" means any physical injury which creates a permanent disfigurement; protracted loss or impairment of a function of a body member, limb or organ, or substantial risk of death.

According to 76-5-109(1)(c):

> "Serious physical injury" means any physical injury which creates a permanent disfigurement; protracted loss or impairment of a function of a body member, limb or organ, or substantial risk or death.

(emphasis added). "Physical injury" is defined in subsection (1)(b) as:

> [I]mpairment of the physical condition including, but not limited to, any contusion of the skin, laceration, failure to thrive, malnutrition, burn, fracture of any bone, subdural hematoma, injury to any internal organ, any injury causing bleeding, or any physical condition which imperils a child's health or welfare.

(emphasis added). Thus, a "physical injury" is the "impairment of the physical condition" which may include "any physical condition which imperils a child's health or welfare." "Serious physical injury" encompasses these same factors but additionally requires a "permanent disfigurement; protracted loss or impairment of a function of a body member, limb or organ, or substantial risk of death."

Clearly, a series or combination of injuries can create an "impairment of physical condition" which "imperils a child's health or welfare." The statute, by its own terms, is not as limiting as defendant suggests. There is no intimation in the above language that the legislature intended "physical injuries" to be limited to single acts rather than series of acts. The "Court's primary responsibility in construing legislation is to give effect to the intent of the legislature." Christensen v. Industrial Commission, 642 P.2d 755, 756 (Utah 1983).

Prior to 1981, Utah did not have a child abuse statute. The State relied primarily upon the aggravated assault statute, Utah Code Ann. § 76-5-103 (1953), as amended, when prosecuting child abusers. This section reads as follows:

> (1) A person commits aggravated assault if he commits assault as defined in section 76-5-102 and:
>
> (a) He intentionally causes serious bodily injury to another; or
>
> (b) He uses a deadly weapon or such means or force likely to produce death or serious bodily injury.
>
> (2) Aggravated assault is a felony of the third degree.

In State v. King, 604 P.2d 923, 926 (Utah 1979), this Court cited Utah Code Ann. § 76-1-609(9) (1953), as amended, which "defines 'serious bodily injury' as 'bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ or creates a substantial risk of death.'"[6] Mr. King strangled, stabbed, and attempted to rape the victim. This Court found that it was proper for an expert witness to consider all of these factors in determining whether the victim "sustained such bodily injury as would create a substantial risk of death." King, 604 P.2d at 926.

When the Utah legislature discussed the proposed child abuse statute in January of 1981 neither the House of Representatives nor the Senate addressed the issue of simple vs. multiple physical injuries. Therefore, this Court must look

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[6] This definition is almost identical with the definition of "serious physical injury" under 76-5-109.

within the meaning and intent of the child abuse statute. In an instance when statutory interpretation is required:

> Allowances should be made for the fact that statutes are necessarily stated in general terms, and that often there is neither the presence to foresee, nor sufficient flexibility of language to cover with exactitude, all of the exigencies of life which may arise. For this reason one of the fundamental rules of statutory construction is that statutes should be looked at as a whole and in the light of the general purpose it was intended to serve; and should be so interpreted and applied as to accomplish that objective. In order to give the statute the implementation which will fulfill its purpose, reason and intention sometimes prevail over technically applied literalness.

Andrus v. Allred, 17 Utah 2d 106, 404 P.2d 972, 974 (1965); see also Snyder v. Clune, 15 Utah 2d 254, 390 P.2d 915, 916 (1964).

The sponsor of 76-5-109, Representative Harrison, said that the child abuse bill was intended to facilitate the prosecution of child abuse cases since they were difficult to prosecute under the aggravated assault statute. He also said:

> This bill really goes to solve a problem of defining a statute expressly for child abuse. It does increase the penalties over the existing aggravated assault penalties. It defines the crime of child abuse more specifically to cover the types of injuries children sustain . . . . From the information that I've received, it appears that this (statute) is needed because of the increases in child abuse.

HB 87, 44th Legis., 8th Sess. (January 19, 1981). To limit the definition of "serious physical injury" to only one injury would destroy the major purpose of the statute which is to curb the increase in child abuse.

Utah Code Ann. § 76-1-106 (1953), as amended, contains the guiding standards this Court should use in construing 76-5-109(1)(c):

> The rule that a penal statute is to be strictly construed shall not apply to this code, any of its provisions, or any offense defined by the laws of this state. All provisions of this code and offenses defined by the laws of this state shall be construed according to the fair import of their terms to promote justice and to effect the object of the law and general purposes of Section 76-1-104.[7]

Justice can only be promoted in this and future child abuse cases by allowing injuries to be considered in the aggregate when dealing with a "serious physical injury" under 76-5-109(1)(c).

Dr. Palmer, therefore, was properly allowed to give opinion testimony concerning the indicators of child abuse, including the combination of injuries Jacob received which created a substantial risk of death.

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[7] Section 76-1-104 reads as follows:

> The provisions of this code shall be construed in accordance with these general purposes.
> (1) Forbid and prevent the commission of offenses;
> (2) Define adequately the conduct and mental state which constitute each offense and safeguard conduct that is without fault from condemnation as criminal;
> (3) Prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition or differences in rehabilitation possibilities among individual offenders.

POINT II

THE EVIDENCE SUFFICIENTLY ESTABLISHED THAT DEFENDANT INTENTIONALLY OR KNOWINGLY INFLICTED OR PERMITTED ANOTHER TO INFLICT SERIOUS PHYSICAL INJURY UPON THE CHILD VICTIM.

As the above standard is applied to the instant case, there is ample evidence to affirm the defendant's conviction of child abuse, a second-degree felony, in the lower court.[8] Jacob received numerous bruises or contusions over most of his body. Half of his body was badly burned. Both of his feet were repeatedly punctured with a sharp instrument and he ultimately died of a severe swelling of the brain. These injuries not only imperiled the child's well-being, but were also life-threatening. (R. Vol. 2, 361).

Defendant asserts that she should only have been convicted of a class A misdemeanor. In making this claim, defendant again relies on the erroneous assumption that a combination or series of injuries cannot be used to constitute a "serious physical injury" under 76-5-109(1)(c). See Appellant's Brief at 9. The clear intent and purpose of the child abuse statute would be destroyed if this assumption were true.

Since the statutory definition of "serious physical injury" can be reasonably construed as meaning any physical injury or combination of injuries, the conviction and sentence

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[8] At trial, Judge Burns said: "[T]aken in the aggretate, the injuries may be sufficient basis for the finding beyond a reasonable doubt by the jury that the injuries sustained over the time material to the charge in this case constituted a substantial risk of death" (R. Vol. 3, 472).

were proper and should stand. The defendant knowingly or intentionally[9] inflicted or permitted another to inflict serious physical injury upon her son, thus creating a substantial risk of death.

CONCLUSION

For the reasons presented above, the state respectfully requests that defendant's conviction and sentence be affirmed.

DATED this 20th day of January, 1987.

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CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing Brief, postage prepaid, to James L. Shumate, attorney for appellant, 110 North Main, Cedar City, Utah 84720, this 20th day of January, 1987.

Earl F. Dorius

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[9] Defendant apparently admits that the injuries were inflicted knowingly or intentionally by claiming that the crime should have been a class A misdemeanor under 76-5-109(3)(a). See Appellant's Brief at 10.